SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM 1973

No. 73-332

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY, PASSAIC COUNTY COURT, LAW DIVISION, and JOSEPH D. J. GOURLEY, Passaic County Prosecutor,

Petitioners,

vs.

UNITED STATES OF AMERICA *ex rel.* JOSEPH RUSSO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

Respondent has been charged, in Indictments No. 1031–71 and 1032–71, with the murder of Charles Sheppard and Shirley Green, on or about January 1, 1971, at a New Year's Eve party at his home. The respondent has now stood trial twice before a jury in the Passaic County Court, with the Honorable Louis Schwartz, J.D.C. (t/a) presiding both times. The first trial took approximately three weeks. Approximately forty witnesses testified, commencing on December 3, 1971. On December 18, 1971, the trial court *sua sponte*, without consultation with or consent of the respondent, discharged the jury during the course of their deliberations.

On Thursday evening, December 16, 1971, after the summations of counsel, the Court instructed the jurors to bring their night clothes with them the following morning. On Friday morning, December 17, 1971, the Court charged the jury and thereafter the jury commenced deliberating at 10:35 A.M. After five or six hours of deliberation, the trial court indicated that it intended to recall the jury and ask them to make an effort to apply themselves to the task at hand and to deliberate further for the purpose of bringing out a verdict. Respondent objected to any further instruction at that time urging that it was not unusual for a jury to deliberate five or six hours after a lengthy trial in a capital case. (Appendix to Petitioner–Appellant Russo's Brief filed in the Court of Appeals hereinafter referred to as Brief Appendix,5a 1 to 6a 8)

At 7:05 P.M. on December 17, 1971, the Court recalled the jury and gave them the Allen Charge, sometimes called the"Dynamite Charge". The respondent of course objected to the charge. At 8:20 P.M., the Court again recalled the jury and informed them that he was going to send them back to the jury room and in a few minutes recall them once more to inquire whether they had arrived at a unanimous verdict. The Court further advised the jury that in the event they had not then reached a unanimous verdict, the Court would have to take the responsibility of making a determination as to whether the jury would continue to stay in the Court

House or whether arrangements would be made for them to retire to a motel for the evening. The respondent again objected that inasmuch as it was only 8:30 P.M. the Court was putting undue pressure on the jury at that point to arrive at a verdict. (Brief Appendix 8A 25 to 13A 17)

At 8:45 P.M., the jury was again recalled to the Courtroom. The Court at this time asked the Forelady whether she believed that if the jury was to stay for a short time at the Courthouse there was a reasonable possibility of arriving at a unanimous verdict. The Forelady responded, "Yes, Your Honor. We need a little bit more time." The trial court then advised the jury that they could have all the time they needed, as follows:

> "A little bit more time. Well, the Court will be very happy to make that available for you, but *you must understand that you can have all the time that you need whether it is tonight or whether it would be tomorrow. Time is no problem.* Those of us who are employed by the County are prepared, as a part of our responsibility, to give the full time to a jury and you folks should understand that you have the full time in order to arrive honestly, without sympathy, without prejudice, without fear, just having in mind what is a just result..." (Emphasis added) (Brief Appendix 4a 6 to 25)

At 9:50 P.M., the jury sent the Court a note stating:

> "Your Honor, we are far from the decision at this time."

The Court then indicated that it would have the jury transported to a motel and that the Court would stand adjourned until the following morning at 9:00 A.M. The respondent moved for a mistrial, the State objected thereto, and the Court in effect denied the motion. (Brief Appendix, 15a 19 to 16a 20)

At 9:55 P.M., the jurors returned to the Courtroom. The trial court addressed the jurors as follows:

"...please remember now that once you leave the jury room and until tomorrow morning you are not to talk to anyone about the matter. I am going to ask you to reserve reviewing the case because you are going to be with Court officers who are not members of the jury so don't talk about the case at all and tomorrow morning we will resume our deliberations. *At that time you will have ample time to engage in further deliberation...*" (Emphasis added)

Thereafter the jurors were transported to a motel for the night. (Brief Appendix, 17a 1 to 18a 3)

The next morning, Saturday, December 18,1971, after the jury entered the Courtroom, the Court addressed the jury as follows:

"Good morning, ladies and gentlemen. I hope that you have had a good night's rest so that *today you can continue with calmness to deliberate,* and so that *without any thought of being hurried* you might review the nature of the discussion that you had up to date..."
(Emphasis added) (Brief Appendix 20a 4–9)

Thereafter, at 9:28 A.M. the jury retired to the jury room for further deliberation. (Brief Appendix 20a 23)

At about 9:35 A.M., a scant seven minutes later, the Court received a note from the jury requesting to hear certain testimony, which was quite extensive. This was the first time during their deliberations that the jury had requested the reading of testimony. It was apparent to all that their deliberations were intensified and active and that the nature of their requests were most significant. (Brief Appendix 21a 6–25)

The State's principal witness was Kenneth Timmerman, who testified that the respondent had shot the deceased. But William Gutowski, a former employee of Timmerman, testified that he was present at the scene of the crime and saw Timmerman fire the shots that killed the deceased. The issue of credibility, therefore,

was of utmost importance. The victims of the crime were Charles Sheppard and Shirley Green. Timmerman had testified that he observed respondent fire several shots at Sheppard from a distance of one foot. Gutowtestified that Timmerman had fired at Sheppard and that he was at a distance of seven or eight feet when he fired the shots. (Brief Appendix 57a, 58a)

Special Agent Courtlandt Cunningham, of the Federal Bureau of Investigation, testified, for the State, that he could find no powder residue on the clothing and body of both Sheppard and Green. Cunningham further testified that if the victims were shot at a distance of less than six feet, powder residue would be found on their clothing and bodies, that six to eight feet is the maximum distance for the existence of powder residue, and that certainly there would be an evident quantity of powder residue if the shots were fired at a distance of one to two feet. (Brief Appendix 58a)

Among the several inquiries made by the jury on the morning of December 18, 1971, of moment was the following:

(a) " Timmerman's testimony as to distance of gun from Sheppard and Shirley. "

(b) "Billy Gutkowski's testimony as to distance."

(c) " F.B.I. report as to powder burns and powder residue."

It was apparent that the foregoing inquiries and the answers therto to be supplied to the jury were most favorable to the respondent and indicated that the jury was seriously considering the defense's version. If the jury accepted the testimony of Special Agent Cunningham of the F.B.I., the jury undoubtedly would find that the State's witness, Timmerman, lied on a material issue, and the credibility of the defense witness, Gutowski, was considerably enhanced. The jury's request was not immediately complied with, however. After the jury submitted its inquiry at about 9:35 A.M., practically the balance of the morning was taken up with researching the record and consultation with counsel and the Court in order to determine exactly where in the

transcript the certain portions of the testimony requested by the jury was contained. There was also additional delay in order to permit one of the Court Reporters who was not present that morning, but was on call, to arrive at the Court House with his notes. As a result, it wasn't until 11:26 A.M. that the jury was recalled and their inquiries, in the main, answered. Then at 11:50 A.M, the jury retired to deliberate. (Brief Appendix, 22a 1 to 40a 20)

At 11:58 A.M., the jury was again recalled for clarification of certain instructions which had just been read to them. At 12:00 noon, the jury again retired. Then, at 12:08 P.M., the jury was again recalled to the Courtroom, and Special Agent Cunningham's testimony relative to the powder burns was read to them. The jury again retired for deliberation at 12:15 P.M. Thereafter, lunch was served to the jury in the jury room. (Brief Appendix 41a 20 to 47a 23)

Thereafter, the respondent and his counsel, while waiting to be served their lunch at a nearby restaurant, were summoned by a Court attendant to immediately return to the Court House. Neither the respondent nor his counsel was advised of the reason therefore. (Brief Appendix 60a) At 2:25 P.M., the trial court, without advice or consultation with the respondent, had the jury returned to the Courtroom and inquired of the Forelady:

"Has the jury arrived at a unanimous verdict?"

The Forelady replied:

"Not yet, Your Honor." (Brief Appendix 48a 8–10)

The trial court thereupon, without consultation with or the consent of the respondent, declared a mistrial and excused the jury. Respondent was quite naturally taken by surprise by what had transpired. Prior thereto, in in every instance when the jury was to be the subject of an inquiry or to be given any instructions, the trial court had scrupulously and invariably consulted with the re-

spondent. Strangely, at this crucial time, the Court *sua sponte* declared a mistrial without consulting the respondent or giving him an opportunity to object thereto. (48a 11 to 49a 11)

It was clear that the jury was not deadlocked. They had just received extensive instructions and had been read testimony focusing on issues damaging to the State's case. They had relatively little opportunity for deliberation before they were recalled and the mistrial declared. It was evident that the jury's inquiries and the answers given in response thereto tended to favor the respondent's position, and that the jury was inclining toward an acquittal. Under the circumstances, the declaration of a mistrial effectively deprived the respondent of a verdict of acquittal.

Prior to the declaration of a mistrial, it had been the common knowledge of those in the Court House and close to the case that the jury was leaning strongly in the direction of acquittal and that the vote stood eight to four in favor of the respondent. This fact was admitted publicly by the Prosecutor, whose statement to this effect appeared in the newspaper on the day following the hearing in the District Court. The walls of the new Passaic County Court House, where the case was tried and where the jury deliberated are far from soundproof, and this fact could have resulted in the accidental disclosure of the actual deliberations of the jury to the court attendants and ultimately to others close to the case. It is possible that the attitude of the jury in favor of acquittal could have eventually been communicated to the trial judge, whose response was to declare a mistrial citing the "weariness" of the jury as his reason.

Reason for Denying the Writ

In finding there was no manifest necessity for the declaration of the mistrial, the Court of Appeals clearly recognized, articulated and applied the abuse of discretion principle of appellate review formulated by Justice Story in *United States v Perez*, 9 Wheat. (22 U.S.) 579, 580 (1824) (Petitioner's Appendix A, 102–112). The Court of Appeals further recognized the recent admonition of this Court in *Illinois v. Somerville*, ____ U.S. ____, 93 S. Ct. ____ 35 L. Ed. 2d 425 (1973), that each case must necessarily turn on its particular facts (Petitioner's Appendix A, 11). Applying these proper principles to the facts of this case, the Court of Appeals found that the trial judge clearly abused his discretion, that this is not a close case, and there is no reason to force respondent through still another (third) trial after he was deprived of a jury in the midst of it's deliberations. There is no justification nor purpose to be served by further review by this Court.

The Fifth Amendment prohibition against placing a defendant "twice in jeopardy" is intended to protect an individual from being subjected to the hazards of more than one trial for the same offense. In *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221 (1957), this Court set forth the rationale behind the double jeopardy clause:

> "The underlying idea, one that is deeply ingrained in at least the Anglo–American System of Jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Green v. United States*, *supra.*, 187–188.

Moreover, this Court has maintained that the fact that the first trial did not result in a verdict of guilt or innocence by the jury does not prevent the defendent from offering the first trial as a bar to a second trial on the same charge. *Green v. United States, supra.*; *Dounum v. United States,* 372 U.S. 734, 83 S. Ct. 1033 (1963)

Yet it is evident that a criminal trial is a relatively complex proceeding, dependent upon a host of unpredictable considerations such as the health of the jurors or the partipicants, and the tactics employed by either side. This Court has recognized that

> "A mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide." *United States v. Jorn,* 400 U.S. 470, 480, 91 S. Ct. 547 (1971)

For this reason, the Federal Courts have long adhered to the relatively flexible doctrine of "manifest necessity" in characterizing those situations where a trial may be aborted prior to a final jury verdict without the double jeopardy clause arising as a bar to another trial of the defendant. This doctrine of "manifest necessity" was first articulated by Mr. Justice Story in *United States v. Perez, supra,* and recently reiterated in *United States v. Jorn, supra.* This Court in *Jorn* held that a trial judge abused his discretion by discharging the jury because of his fear that five taxpayers involved in the litigation had not been adequately warned of their constitutional rights, thereby adding *Jorn* to the recent line of cases narrowing the discretion of a trial judge to declare a mistrial without the double jeopardy clause closing the door to further proceedings. See also *Downum v. United States, supra.*; *United States v. Lansdown,* 469 F. 2nd 164 (4th Cir., 1972).

Mr. Justice Harlan, writing for the Court in *Jorn*, set forth very strict standards for judicial discretion before

a mistrial can be declared without a motion on the part of the defendant. Absent such a motion,

> "The *Perez* doctrine of manifest necessity stands as a command to judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States v. Jorn, supra.*, 485.

Recently, the Fourth Circuit Court of Appeals handed down a decision in a case almost identical to the present one. *United States v. Lansdown, supra.*, was a criminal case in which the trial judge acting entirely on his own and without conferring with counsel for either side declared a mistrial and discharged the jury after they had failed to reach a verdict. *Lansdown*, like the present case, presented very close and difficult questions of fact for the jury to decide. In *Lansdown*, as in this case, the judge gave the Allen charge, or "dynamite charge", to the jury after they had deliberated for several hours, at the same time advising the jury that they could take all the time they felt necessary to reach a decision. In fact, the jury in *Lansdown* had actually informed the judge that they were unable to agree upon a verdict prior to his administering the Allen charge, something which the jury never even suggested in the present case. And in the middle of the second day of deliberations by the jury in *Lansdown*, the judge *sua sponte* declared a mistrial without consulting either side, just as in the present case.

The Fourth Circuit found that there was no "manifest necessity" in *Lansdown* for declaring a mistrial when the trial judge did so, citing the failure of the judge to seek the opinion of either side and his failure to inquire as to whether the jury was about to reach a verdict or thought a verdict was possible despite his previous statements that the jury could be "leisurely in its deliberations." In its opinion in *Lansdown*, the Court was careful to point out that the decision to declare a mistrial in cases of apparent inability to agree should not be based solely on the length of time that the jury has

deliberated, stressing the importance of inquiring of the jury itself, and citing numerous cases where mistrials had been upheld after varying periods of deliberation only because in each the jury had expressly stated that they were hopelessly deadlocked. This position is further supported by the decision of the Supreme Court in *Logan v. United States*, 144 U.S. 263, 36 S. Ct. 429 (1892) where "manifest necessity" for a mistrial was found to exist after the jury had deliberated for forty hours but only after they had announced at that point that they were unable to agree.

By contrast, in the present case, the jury actually gave a number of clear indications that their deliberations were progressing and that a verdict would be forthcoming, indications that were not even present in the *Lansdown* case. On the morning of the second day of their deliberations, the jury requested to have elements of the testimony of key witnesses of the trial read to them, as set forth in the Statement of the Case, *supra*, which took most of the morning to accomplish. These requests indicated that the jury's deliberations were active and focused directly on the key question in the case. Yet only two hours after the requests of the jury were finally satisfied, and during which time they had paused for lunch, the trial judge, acting solely on his own, took the case out of their hands.

It is also significant to note that when the judge immediately prior to declaring a mistrial inquired as to whether the jury had as yet arrived at a unanimous verdict, the forelady replied,

"Not yet, Your Honor".

It is clear that the response "not yet" is not a declaration of a deadlock. This conclusion is strongly supported by *People, ex. rel.* Stabile v. *Warden of City Prison*, 202 N.Y. 138 (Ct. App. 1911), a case similar to the present one in which the defendant sought to bar a second trial on the grounds of double jeopardy, alleging that the trial judge abused his discretion in discharging the jury. In deciding for the defendant, the New York Court of Appeals concluded that the re-

sponse "Not as yet" clearly indicated that the jurymen had not completed their discussion and deliberation in an effort to reach a verdict, and that they were in the midst of such discussion and deliberation, and that they required further time before they could determine whether they were able to agree upon a verdict. The Court in *Stabile* stated that

> "The reply included by implication a hope and perhaps even an expectation of an agreement." See also *State ex. rel. Schlesenger v. Glick*, 325 N.Y.S. 2d. 869 (Sup. Ct. 1971).

It seems apparent, then, that based on the strict standard of "scrupulous exercise of judicial discretion" established by the Supreme Court in *Jorn*, along with the failure of the trial judge in this case to inquire into the progress of the deliberations as in *Lansdoun* and the failure of the jury to announce on its own initiative that it was hopelessly deadlocked as in *Logan*, but rather offered clear indications to the contrary, that there was no "manifest necessity" for the judge in the present case to declare a mistrial on the grounds that the jury was unable to agree on a verdict. However, statements made by the trial judge in discharging the jury in this case could be seized upon in an attempt to argue that "manifest necessity" for declaring a mistrial did exist. This feature of the case, which slightly distinguishes this case from the situation in *Lansdown*, must be met head on.

The trial judge in the present case made the following remarks to the jury upon discharging them, remarks which reflect at least part of his basis for his *sua sponte* declaring a mistrial:

> "I felt I wanted to have a full opportunity for you to review and to deliberate and, therefore, I arranged for you to have the unpleasantness of going to a motel which you did, and since then you have had breakfast, you deliberated, you have had lunch, and I noticed as you walked out you seem to be walking out so very wearily and I appreciate very much all that you have done

and I am satisfied that it would not be fair to the defendant, nor to the State if in your weariness you arrived at unanimity just for the sake of entering a verdict. I feel that this requires you to be alert and that the time has passed when there is a risk that your verdict would not really represent what you actually feel would be just." (Brief Appendix 48a 15 to 49a 4)

With good reason appellate courts are generally reluctant to overrule a lower court judge whose exercise of his discretion must be based on a subjective judgment of the specific situation before him. Yet it cannot be argued in the present case that the trial judge, who based his decision on a subjective evaluation of the "weariness" of the jurors would affect their judgment or whether the jurors were deadlocked, as the Court said in *Lansdown*,

> "The most reliable source as to this information is the jury itself."

Yet neither in respect to whether the jurors were deadlocked nor in respect to whether they were "weary" and whether such "weariness" might affect their judgment did the trial judge ever make an inquiry of the jurors themselves. Nor did the trial judge at any time ever confer with counsel for either the defendant or the prosecution or seek any other outside opinion to help measure whether his subjective evaluation of the capabilities of the jurors at the time that the mistrial was declared was apparent to others or whether he could possibly have been mistaken. All he had were a few hints or possible suggestions from having the jurors in his presence for several short periods of time that morning in the face of clear indications that they were actively and energetically working toward a verdict. [1]

[1] The District Court assumed that the trial court was moved to declare a mistrial "by the obvious exhaustion of the jury". *United States ex rel. Joseph Russo v. Superior Court of New Jersey*, Civil No. 1304-72, 9 (D.N.J. September y, 1972). (112a) Yet, the record offers not even the slightest indication of exhaustion on the part of any member of the jury.

And even if it is assumed for a moment that the trial judge's evaluation was generally accurate, there clearly can be little basis for an argument that "weariness" on the part of the jurors created "manifest necessity" for a declaration of a mistrial. Those cases in which a finding of "manifest necessity" has been sustained give a clear indication of the circumstances justifying termination of the trial and subsequent reprosecution. The Court in *Olke v. United States*, 389F 2d. 668 (9th Cir. 1968), cert. denied *Graves v. United States*, 390 U.S. 1029, 88 S. Ct. 1420 (1968) sets out several situations supported by appropriate citations where double jeopardy is not a bar to a second trial: where the jury is unable to agree; or where a juror swears falsely on *voir dire*; or where a juror or the Court becomes ill or incapacitated. Added to this list are cases where outside influences are brought to bear on the jury: *Simmons v. United States*, 142 U.S. 148, 12 S. Ct. 171 (1891): or cases of tactical needs of the military in time of war: *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834 (1949). All of these cases support the conclusion of Mr. Justice Douglas, who wrote the Opinion in *Downum* and who stood with the majority in *Jorn*, that "manifest necessity" requires a relatively objective "breakdown in jurdiial machinery". *Gori v. United States, supra.*, 372 (Douglas, J. dissenting).

Clearly, on the basis of the cases enumerated above, and on the basis of those recent cases where a finding of "manifest necessity" was not sustained, that is, *Downum*, *Jorn*, and *Lansdown*, any apparent "weariness" on the part of the jurors in the present case cannot be argued to constitute "manifest necessity" for a mistrial and reprosecution of the defendent. Every trial under our system of justice must endure the human qualities of the participants. It is difficult to imagine a trial as long as the present one, let alone a trial lasting for many weeks, in which the jurors would not become "weary". And this fact must be especially true in the case of a murder trial where the jury's task is so serious and their deliberations must be so intense, often consuming many hours. Is it not highly likely that if the present case is tried again the jurors will be just as "weary" near the end of the trial, if not even more so?

Even forgetting for a moment the requirement of "manifest necessity", allowing a trial judge *sua sponte* to declare a mistrial and reprosecution of the case solely on the ground that he felt the jurors were "weary" would create a standard so vague and so subjective as to promote arbitrariness and even abuse. Clearly distinct from cases of illness or exhaustion, of which there is no indication or even suggestion in the present case, it is difficult to imagine any trial of any substantial length in which a judge could not determine the jurors to be "weary" and declare a mistrial.

A defendant in a criminal case has a

> "valued right to have his trial completed by a particular tribunal". *Wade v. Hunter, supra.*, 689.

For this reason the Courts have consistently encouraged a very strict standard in applying the doctrine of "manifest necessity" on those

> "occasions when the citizen can for the same offense be required to run the gauntlet twice". *Gori v. United States, supra.*, 373 (Douglas, J., dissenting).

In the words of Mr. Justice Story, who coined the doctrine of "manifest necessity" in *Perez*, cited in *Downum*;

> "The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.' *Downum v. United States, supra.*, 736, citing *United States v. Coolidge*, 25 Fed. Cas. 622, 623 (1813).

Those extraordinary and striking circumstances did not exist in the present case and clearly the trial judge

Those extraordinary and striking circumstances did not exist in the present case; and clearly the trial judge abused his discretion in declaring a mistrial.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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